Sugu a/l Nadaraja v Timbalan Menteri Dalam Negeri, Malaysia & Ors

FEDERAL COURT (PUTRAJAYA) — CRIMINAL APPEAL NO 05–116 OF 2010(B)
ARIFIN ZAKARIA CJ (MALAYA), ZULKEFLI AND JAMES FOONG FCJJ
25 JANUARY 2011

Preventive Detention — Detention — Application for habeas corpus — Appellant detained pursuant to s 3(3)(a) and (b) of the Emergency (Public Order and Prevention of Crime) Ordinance 1969 ('the Ordinance') — Deputy Minister issued detention order under s 4(1) of Ordinance against appellant — Deputy Minister relied on case filed forwarded by Deputy Superintendent of police who was not designated officer — Whether case file could be considered as report that could be accepted by Deputy Minister in making his decision in issuing detention order — Whether appellant had been denied right to be represented by counsel — Emergency (Public Order and Prevention of Crime) Ordinance 1969 ss 3(3)(a), (b), (c) & 4(1)

The appellant was arrested on 25 May 2010 and detained until 16 June 2010 pursuant to s 3(3)(a) and (b) of the Emergency (Public Order and Prevention of Crime) Ordinance 1969 ('the Ordinance'). Subsequently, the Deputy Internal Minister ('the Deputy Minister') issued a detention order under s 4(1) of the Ordinance dated 16 June 2010 against the appellant within 30 days of the appellant's arrest and detention. In issuing the said detention order, the Deputy Minister relied on the case file forwarded to him by DSP Mohd Sukri bin Kaman ('DSP Sukri') who was not a police officer designated by the Inspector General of Police ('the IGP') under s 3(3)(c) of the Ordinance. The appellant then filed an application for a writ of habeas corpus, but the said application was dismissed by the learned judicial commissioner. Dissatisfied with the decision, the appellant filed the present appeal on two grounds: (a) whether the case file forwarded to the Deputy Minister by DSP Sukri who was not a designated officer exercising the functions under s 3(3)(c) of the Ordinance could be considered as a report that could be accepted by the Deputy Minister in making his decision to issue the detention order under s 4(1) of the Ordinance; and (b) whether the appellant in the circumstances of the case had been denied the right to be represented by a counsel.

Held, allowing the appeal and ordering that the appellant be released forthwith:

(1) The provision of s 3(3)(a), (b) and (c) of the Ordinance must be read as a whole for the purpose of the Minister or a Deputy Minister exercising his power to issue a detention order under s 4(1) of the Ordinance. It was only the IGP or the police officer designated by the IGP under s 3(3)(c) of the Ordinance who could forward the case file or the report containing the circumstances of the arrest and the detention of the appellant to the Minister or a Deputy Minister for his consideration. In the circumstances of the case there was no report as envisaged under s 3(3)(c) of the Ordinance placed before the Deputy Minister for his consideration in issuing a detention order under s 4(1) of the Ordinance. Such a report was a condition precedent to a valid detention order. DSP Sukri was not a police officer designated by the IGP under s 3(3)(c) of the Ordinance and he was not empowered to forward any report to the Deputy Minister. There was therefore a procedural non-compliance in the detention of the appellant (see paras 8–9).

(2) The court expressed its utmost concern over the manner in which the appellant's right to be heard before the Advisory Board was brought to his attention and the opportunity afforded to him to be represented by a counsel. The court noted that the notice of hearing before the Advisory Board issued by way of the Form II of the Schedule to the Public Order and Prevention of Crime (Procedure) Rules 1972 was only served on the appellant four days before the hearing date. The said Form II was served on the appellant on 1 July 2010 for the hearing before the Advisory Board scheduled on 5 July 2010. It should also be noted that 3 July 2010 was a Saturday and 4 July 2010 was a Sunday. Therefore, technically the appellant only had two working days, that was on Thursday (1 July 2010) and Friday (2 July 2010) to engage a counsel. On this issue, there was in fact insufficient time given to the appellant in the circumstances of the case to engage a counsel in order for him to be effectively represented before the Advisory Board (see paras 10–11).

[Bahasa Malaysia summary

Perayu telah ditangkap pada 25 Mei 2010 dan ditahan sehingga 16 Jun 2010 menurut s 3(3)(a) dan (b) Ordinan Darurat (Ketenteraman Awam dan Mencegah Jenayah) 1969 ('Ordinan'). Seterusnya, Timbalan Menteri Dalam Negeri ('Timbalan Menteri') mengeluarkan perintah tahanan di bawah s 4(1) Ordinan bertarikh 16 Jun 2010 terhadap perayu dalam masa 30 hari dari penangkapan dan penahanan perayu. Dalam mengeluarkan perintah tahanan tersebut, Timbalan Menteri bergantung kepada fail kes yang dikemukakan kepadanya oleh DSP Mohd Sukri bin Kaman ('DSP Sukri') yang bukan merupakan pegawai polis yang ditetapkan oleh Ketua Polis Negara ('KPN') di bawah s 3(3)(c) Ordinan. Perayu kemudian memfailkan permohonan untuk writ habeas corpus, tetapi permohonan tersebut telah ditolak oleh pesuruhjaya kehakiman yang bijaksana. Tidak berpuas hati dengan keputusan tersebut,

perayu memfailkan rayuan semasa di atas dua alasan: (a) sama ada fail kes yang dikemukakan kepada Timbalan Menteri oleh DSP Sukri yang bukan merupakan pegawai yang ditetapkan menjalankan fungsi di bawah s 3(3)(c) Ordinan boleh dianggap sebagai laporan yang boleh diterima oleh Timbalan Menteri dalam membuat keputusan untuk mengeluarkan perintah tahanan di bawah s 4(1) Ordinan; dan (b) sama ada perayu dalam keadaan kes semasa telah dinafikan hak untuk diwakili oleh seorang peguam.

Diputuskan, membenarkan rayuan dan memerintahkan agar perayu dilepaskan dengan segera:

(1) Peruntukan s 3(3)(a), (b) dan (c) Ordinan tersebut hendaklah dibaca secara keseluruhan bagi tujuan Menteri atau Timbalan Menteri yang menjalankan kuasanya untuk mengeluarkan suatu perintah tahanan di bawah s 4(1) Ordinan. Hanya KPN atau pegawai polis yang ditetapkan oleh KPN di bawah s 3(3)(c) Ordinan yang boleh mengemukakan fail kes atau laporan yang mengandungi keadaan penangkapan dan penahanan perayu kepada Menteri atau Timbalan Menteri untuk pertimbangannya. Dalam keadaan kes semasa, tidak ada laporan seperti yang dijelaskan di bawah s 3(3)(c) Ordinan di hadapan Timbalan Menteri untuk pertimbangannya dalam mengeluarkan suatu perintah tahanan di bawah s 4(1) Ordinan. Laporan sedemikian adalah prasyarat untuk perintah tahanan yang sah. DSP Sukri bukanlah seorang pegawai polis yang ditetapkan oleh KPN di bawah s 3(3)(c) Ordinan dan dia tidak diberi kuasa untuk mengemukakan apa-apa laporan kepada Timbalan Menteri. Oleh itu, terdapat ketidakpatuhan prosedur dalam penahanan perayu (lihat perenggan 8–9).

(2) Mahkamah menyatakan kebimbangannya di atas cara hak perayu untuk didengar di hadapan Lembaga Penasihat dibawa kepada pengetahuannya dan peluang yang diberikan kepadanya untuk diwakili peguam. Mahkamah menyatakan bahawa notis pendengaran di hadapan Lembaga Penasihat yang dikeluarkan melalui Borang II Jadual Peraturan Ketenteraman Awam dan Mencegah Jenayah (Prosedur) 1972 hanya disampaikan kepada perayu empat hari sebelum tarikh pendengaran. Borang II tersebut telah disampaikan kepada perayu pada 1 Julai 2010 untuk pendengaran di hadapan Lembaga Penasihat yang dijadualkan pada 5 Julai 2010. Ia juga harus diperhatikan bahawa 3 Julai 2010 adalah hari Sabtu dan 4 Julai 2010 adalah hari Ahad. Oleh itu, secara teknikal, perayu hanya mempunyai dua hari bekerja, iaitu pada hari Khamis (1 Julai 2010) dan Jumaat (2 Julai 2010) untuk mendapatkan khidmat peguam. Mengenai isu ini, dalam keadaan kes, sememangnya masa yang diberi kepada perayu adalah tidak mencukupi untuk mendapatkan khidmat peguam untuk mewakilinya secara berkesan dihadapan Lembaga Penasihat (lihat perenggan 10–11).]

Notes

For cases on application for habeas corpus, see 10(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 1570–1572.

Legislation referred to

Emergency (Public Order and Prevention of Crime) Ordinance 1969 ss 3(3)(a), (3)(b), (3)(c), 4(1)

Public Order and Prevention of Crime (Procedure) Rules 1972 Schedule, Form II

Appeal from: Criminal Application No 44–131 of 2010 (High Court, Shah Alam)

P Visnovarman (Alvinthiren & Partners) for the appellant.

Amir Nasruddin (Senior Federal Counsel, Ministry of Home Affairs) for the respondents.

Zulkefli FCJ (delivering judgment of the court):

[1] This is an appeal by the appellant against the decision of the learned judicial commissioner of the High Court at Shah Alam in dismissing his application for a writ of habeas corpus.

[2] The appellant was arrested on 25 May 2010 and detained until 16 June 2010. He was detained pursuant to s 3(3)(a) and (b) of the Emergency (Public Order and Prevention of Crime) Ordinance 1969 ('the Ordinance').

[3] The Deputy Internal Minister ('Deputy Minister') thereafter issued a detention order under s 4(1) of the Ordinance dated 16 Jun 2010 against the appellant within 30 days of the appellant's arrest and detention. In issuing the said detention order the Deputy Minister relied on the case file forwarded to him by DSP Mohd Sukri bin Kaman ('DSP Sukri') who is not a police officer designated by the Inspector-General of Police ('IGP') under s 3(3)(c) of the Ordinance.

[4] Before us learned counsel for the appellant submitted that he would be arguing only on two grounds of appeal which can be summarised as follows:

(a) whether the case file forwarded to the Deputy Minister by DSP Sukri who is not a designated officer exercising the functions under s 3(3)(c) of the Ordinance can be considered as a report that can be accepted by the Deputy Minister in making his decision to issue the detention order under s 4(1) of the Ordinance; and

A (b) whether the appellant in the circumstances of this case has been denied the right to be represented by a counsel.

B **[5]** We shall first deal with the first ground of appeal. DSP Sukri in his affidavit filed on behalf of the respondents had stated that on 8 June 2010 he received the report on the circumstances of the arrest and detention of the appellant from ASP Azmi Shah. DSP Sukri later forwarded the case file containing the circumstances of the arrest and detention of the appellant to the Deputy Minister. The Deputy Minister in his affidavit confirmed that he C received the case file which contained the circumstances of the arrest and detention of the appellant from DSP Sukri. The Deputy Minister however stated that he had not received any report from the IGP or a police officer designated by the IGP pursuant to s 3(3)(c) of the Ordinance as according to him the investigation of the case against the appellant had been completed D within 30 days. The Deputy Minister also stated that after perusing the circumstances of the arrest and detention of the appellant in the case file that he had received from DSP Sukri, he was satisfied that the detention order be issued against the appellant.

E **[6]** The question posed here is whether DSP Sukri is empowered to forward the case file containing the circumstances of the arrest and detention of the appellant to the Deputy Minister and can the said case file be considered as a report under s 3(3)(c) of the Ordinance for the purpose of the Deputy Minister issuing the detention order under s 4(1) of the Ordinance. We would answer F the question posed in the negative. We find there is no such provision under s 3(3)(a), (b) and (c) of the Ordinance for a police officer of the rank of Deputy Superintendent like DSP Sukri to forward a case file or a report containing the circumstances of the arrest and detention of the appellant to the Deputy Minister for the purpose of the Deputy Minister issuing a detention order. G Under s 3(3)(c) of the Ordinance, a police officer of the rank of Deputy Superintendent and above is only authorised to report the circumstances of the arrest and detention of a person to the IGP or to a police officer designated by the IGP in that behalf if a person has been detained for more than thirty days. H Thereafter, it is only the IGP or the police officer designated by him who is authorized to submit the report containing the circumstances of the arrest and detention of a person to the Minister. For easy reference we reproduce in full the provision of s 3(3) of the Ordinance as follows:

I Section 3(3)

Any person arrested and detained under this section may be detained in police custody for a period not exceeding sixty days without an order of detention having been made in respect of him under section 4(1):

Provided that —

(a) He shall not be detained for more than twenty four hours except with the authority of a police officer of or above the rank of Inspector; A

(b) He shall not be detained for more than forty eight hours except with the authority of a police officer of or above the rank of Assistant Superintendent; B

(c) He shall not be detained for more than thirty days unless a police officer of or above the rank of Deputy Superintendent has reported the circumstances of the arrest and detention to the Inspector-General of Police or to a police officer designated by the Inspector-General in that behalf and the Inspector-General or the police officer so designated by him, as the case may be, shall forthwith report the same to the Minister. C

[7] The learned senior federal counsel ('SFC') appearing for the respondents contended that there is no requirement for the report relating to the circumstances of the arrest and detention of the appellant pursuant to s 3(3)(c) of the Ordinance be forwarded to the Deputy Minister in this case because the investigation process against the appellant had been completed within a period of 30 days. It is sufficient according to learned SFC for DSP Sukri even though he is not a police officer designated by the IGP under s 3(3)(c) of the Ordinance to forward to the Deputy Minister the case file containing the circumstances of the arrest and the detention of the appellant for the purpose of the Deputy Minister issuing a detention order. D E

[8] With respect we could not agree with the above contention of the respondents. It is our considered view that the provision of s 3(3)(a), (b) and (c) of the Ordinance must be read as a whole for the purpose of the Minister or a Deputy Minister exercising his power to issue a detention order under s 4(1) of the Ordinance. It is only the IGP or the police officer designated by the IGP under s 3(3)(c) of the Ordinance who could forward the case file or the report containing the circumstances of the arrest and the detention of the appellant to the Minister or a Deputy Minister for his consideration. It is the intention of the Legislature that the act of detaining the appellant and the reporting of the circumstances of the arrest and detention of the appellant must go through the necessary steps as provided for under s 3(3)(a), (b) and (c) of the Ordinance which involves going through the IGP or a police officer designated by the IGP before it reaches the Minister or a Deputy Minister. In our view the sole reason that the last officer to prepare the report containing the circumstances of the arrest and detention of the appellant shall be the IGP himself or a police officer designated by him clearly shows that the highest ranking police officer must have vetted the report carefully before it reaches the Minister or a Deputy Minister. F G H I

[9] We are of the view in the circumstances of the case there was no report as envisaged under s 3(3)(c) of the Ordinance placed before the Deputy Minister

for his consideration in issuing a detention order under s 4(1) of the Ordinance. Such a report is a condition precedent to a valid detention order. DSP Sukri is not a police officer designated by the IGP under s 3(3)(c) of the Ordinance and he is not empowered to forward any report to the Deputy Minister. There is therefore a procedural non-compliance in the detention of the appellant. On this first ground of appeal alone we would allow this appeal. Nevertheless, we shall continue to deal with the second ground for completeness.

[10] On the second ground the appellant had stated in his affidavit that at the first hearing date of his representation before the Advisory Board he had made an application for an adjournment with a view to appointing a counsel to represent him but was refused. In reply, the respondents through the affidavit of the Secretary of the Advisory Board had denied the said contention of the appellant. It is also the averment of Detective Corporal Balakrishnan a/l Pachaiappan who acted as an interpreter at the hearing before the Advisory Board that the appellant did not request for a postponement to engage a counsel. There are therefore two conflicting versions given by the appellant and the respondents in the respective affidavits filed with regard to the issue of whether the appellant was in fact denied the right to be represented by a counsel. We do not think that we should resolve here which one of the two conflicting versions was the correct version. However, we would like to express our utmost concern over the manner in which the appellant's right to be heard before the Advisory Board was brought to his attention and the opportunity afforded to him to be represented by a counsel.

[11] We noted that the notice of hearing before the Advisory Board issued by way of the Form II of the Schedule to the Public Order and Prevention of Crime (Procedure) Rules 1972 was only served on the appellant four days before the hearing date. The said Form II was served on the appellant on 1 July 2010 for the hearing before the Advisory Board scheduled on 5 July 2010. It should also be noted that 3 July 2010 was a Saturday and 4 July 2010 was a Sunday. Therefore technically the appellant only had two working days, that is on Thursday (1 July 2010) and Friday (2 July 2010) to engage a counsel. On this issue we would categorically state here that there was infact insufficient time given to the appellant in the circumstances of the case to engage a counsel in order for him to be effectively represented before the Advisory Board.

[12] For the reasons abovestated we allow this appeal. Consequentially, we hereby order that the appellant be released forthwith.

Appeal allowed; appellant ordered to be released forthwith.

Reported by Dzulqarnain Ab Fatar